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Backgrounder



# MOBILITY RIGHTS, THE ECONOMIC UNION AND THE CONSTITUTION


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# MOBILITY RIGHTS, THE ECONOMIC UNION AND THE CONSTITUTION

## INTRODUCTION

Although economic union and free trade among the provinces were major reasons for Confederation, the provisions of the Constitution itself proved defective in ensuring such an outcome. By the beginning of the 1980s, concerns were increasingly raised as to the state of the Canadian economic union. Various constitutional amendments were suggested, the broadest being to expand section 121 of the Constitution Act, 1867, which prohibits interprovincial tariffs,(1) so as to include all interprovincial trade barriers. Although this was not acceptable to the provinces, an individual mobility rights section was added to the Charter as section 6.(2)

In April 1989, the Supreme Court of Canada came down with a decision on the application of section 6 that could have wide-ranging implications (the Black case).(3) La Forest J., speaking for the court, commenced his analysis of the "scope and and effect" of section 6(2) with a historical summary of the reasons for Confederation, stressing the economic union:

> The creation of a central government, the trade and commerce power, 121 and the building of a trans-continental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the British North America Act attempted

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(1) This section states: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other provinces."

(2) See p. 18 for section 6 in full.

(3) Black v. Law Society of Alberta, [1989] 1 S.C.R. 591.

> to pull down the existing internal barriers that restricted movement within the country.(4)

Moreover, he went on to refer to section 121 in the broadest terms, holding that the word "free" in the context of 121 meant "without impediment related to the traversing of a provincial boundary."(5)

Should this emphasis on the economic union and the importance of economic mobility be continued in future decisions, section 6 of the Charter, together with a revived section 121 of Constitution Act, 1867, could play a significant role in breaking down interprovincial non-tariff barriers.

## THE HISTORICAL CONTEXT

> But the proposal now before us is to throw down all barriers between the provinces -- to make a citizen of one, a citizen of the whole; the proposal is, that our farmers and manufacturers and mechanics shall carry their wares unquestioned into every village of the Maritime Provinces; and that they shall with equal freedom bring their fish, and their coal and their West India produce to our three millions of inhabitants. The proposal is, that the law courts, and the schools, and the professional and industrial walks of life, throughout all the provinces, shall be thrown equally open to us all.(6)

While the framers of the American Constitution were concerned with guaranteeing life, liberty and the pursuit of happiness, the Fathers of Confederation seem to have pursued the more modest goals of peace, free trade and the pursuit of compromise. The proposed union of 1867 was to secure peace by creating a more defendable nation against which the Americans would be less likely to move, or, as Sir John A. Macdonald put

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(4) Ibid., p. 609.

(5) Ibid.

(6) The Hon. George Brown, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada, Quebec, 1865, p. 99.

it, affording "the means of mutual defence and support against aggressions and attack."(7) The pursuit of compromise resulted in an elaborately constructed division of powers, which would, among other things, provide a way out of the deadlock between Upper and Lower Canada.

> The straining energies and ambitions of the western section of the Province could find no scope within the de facto federalism of the existing union; and the cultural interests of the eastern sections were thought to be endangered by anything but a de jure unity...(8)

The third goal, "a commercial union, with unrestricted free trade, between people of the five provinces"(9) must have seemed the easiest to achieve. As it became evident that the Reciprocity Treaty of 1854-66 with the United States was to be abrogated, interest in free trade among the provinces increased. Although the idea of a national economy was attacked by some, especially in the Maritime provinces, in most quarters "the national economy of British North America was a recognized objective of Confederation."(10)

The Fathers of Confederation felt confident that they had secured to the national government the necessary tools to forge an effective union. Donald Creighton suggests that they:

> attempted to separate the affairs and interests associated with commerce from certain rights and customs dependent upon land. The former, which covered the great bulk of economic activities of British North America as they knew it, they gave to the control of the Dominion; the latter, which included matters of

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(7) The Hon. John A. Macdonald, ibid., p. 28.

(8) Donald G. Creighton, British North America at Confederation, Ottawa, 1939, p. 21, 50 (A Study Prepared for the Royal Commission on Dominion-Provincial Relations).

(9) The Hon. George Brown (1865), p. 27.

(10) Creighton (1939), p. 41.

> minor economic, or of largely cultural, importance, they entrusted to the provinces.(11)

The three main economic weapons given to the federal government, according to Creighton, were the peace, order and good government power, the regulation of trade and commerce, and the power to disallow provincial acts. Section 121 appears to have been an afterthought, which did not appear until the fourth draft of the Act.(12) In 1867, the phrase "peace, order and good government" was extraordinarily comprehensive, "used by the colonial office and the Imperial government in conveying to colonial legislatures the entire range of their legitimate legislative authority."(13) Similarly, the phrase "trade and commerce" had "come to acquire the greatest importance and widest amplitude."(14) In fact, the language of the Constitution Act, 1867 granted the federal government a broader range of trade and commerce powers than the Constitution of the United States granted to Congress.

As things turned out, however, the American judiciary chose to expand the scope of the federal commerce power, while in Canada both the peace, order and good government clause and the trade and commerce power were severely limited in early decisions by the Privy Council.

> The history of the trade and commerce power closely parallels the history of the peace, order and good government power... Like the peace, order and good government power, the trade and commerce power was severely contracted by the Privy Council, but has been permitted to expand somewhat by the Supreme Court of

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(11) Ibid., p. 50.

(12) G.V. La Forest, The Allocation of Taxing Power under the Canadian Constitution (2nd ed.), Canadian Tax Foundation, Toronto, 1981, p. 6.

(13) Creighton (1939), p. 53.

(14) Ibid.

Canada since the abolition of appeals to the Privy Council.(15)

Nor did the disallowance power prove to be as effective as originally assumed. Creighton, in 1939, still felt that "just as the imperial government had used the power of disallowance to defend the provisions of the mercantile system, so the federal government was likely to employ it to protect the economic policies designed for the general interest of Canada."(16) Even as he wrote, however, the disallowance power was falling into disfavour and, arguably, constitutional obsolescence.(17)

In short, despite the attempt to ensure the economic union by reposing all trade, commerce, transportation and financial powers in the federal government, the early interpretations of the Constitution Act, 1867, left the provinces with far more room to develop their own economic policies and raise interprovincial barriers than the Fathers of Confederation would have thought possible. As well, an increasingly complex economic environment gradually led to a variety of non-tariff barriers and government interventions that would have been beyond the comprehension of a nineteenth century politician or economist.

## THE INTERPRETATION OF SECTION 121

The late entry of section 121 into the Constitution Act, 1867 may have been due simply to the fact "that it is so fundamental to the

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(15) Peter Hogg, Constitutional Law of Canada (2nd ed.), Carswell, Toronto, 1985, p. 440-1.

(16) Creighton (1939), p. 55.

(17) The 112th and last provincial statute to be disallowed, in 1943, was an Alberta Act "to prohibit the Sale of Land to any Enemy Aliens and Hutterites for the Duration of the War." G.V. La Forest, Disallowance and Reservation of Provincial Legislation, Department of Justice, Ottawa, 1955, p. 82.

scheme envisaged that it was taken for granted."(18) Another possibility is that, because it was so fundamental, it was deliberately added as an obligation on the part of governments rather than, as with the main part of the Constitution, a division of powers between them. In any case, it seems at first glance clearly to prohibit the erection of economic barriers to the movement of goods between provinces:

> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other provinces.

It should be borne in mind that "economic mobility" is generally considered to include mobility of labour, services and capital, while section 121 has been assumed to apply only to goods. George Brown's description of Confederation,(19) however, assumes mobility of labour and services, and the Fathers of Confederation may well have assumed that the broad federal powers over trade and commerce, together with sections 91(14) through (21), would prevent inter-provincial barriers to the relatively simplified movements of capital that took place in the nineteenth century.(20)

A second point is that section 121 is one of the few sections of the original Constitution that is concerned with limiting governmental power rather than allocating it between the federal and provincial governments. In fact, if we go through the non-procedural sections of the Constitution Act, 1867, only three sections appear to limit both levels of governments: section 121, section 125 (exemption of public lands and property from taxation), and section 133 (use of the English and

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(18) La Forest (1981), p. 6.

(19) The Hon. George Brown (1865), p. 99.

(20) Sections 91(14) through (21) give the federal government power over currency and coinage; banking, incorporation of banks, and the issue of paper money; savings banks; weights and measures; bills of exchange and promissory notes; interest; legal tender; and bankruptcy and insolvency.

French languages in Quebec). Of these, only sections 121 and 133 appear to confer any rights enforceable by an individual against all government rather than against a specific level of government.

Finally, the exact meaning of "free" in "all Articles ... shall ... be admitted free into each of the other provinces" has never been fully clarified. Despite an early trend toward limiting the meaning of the words to "free of duty," the door has never been closed on a broader or more flexible interpretation.

Various commentators have noted that section 121 has generated surprisingly little case law. The first three cases commenting on it, Gold Seal, Nat Bell, and Little(21) were all concerned with liquor legislation of a generally prohibitive nature around 1920. In all three cases, the defendants attempted to give the word "free" an almost "civil rights" as opposed to an economic meaning. The various courts involved rejected that concept, and limited the word "free" to meaning free of customs duties, or "without any tax or duty imposed as a condition of ... admission" into the province.(22)

In Gold Seal, the validity of the Canada Temperance Act, which prohibited the importation of liquor into any province where its sale was not allowed by provincial law, was under attack. The Supreme Court decided that the legislation fell within the federal peace, order and good government power, and Duff J. explained why it did not violate section 121:

> The essential word here is "free" and what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade. (p. 470)

In Nat Bell, the Alberta Liquor Act was under attack for prohibiting the sale of liquor within the province (with certain limited exceptions), and for placing severe restrictions on a person in possession

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(21) Gold Seal Ltd. v. A.G. Alberta (1921), 62 S.C.R. 424; R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128; Little v. A.G.B.C. (1922), 65 D.L.R. 297

(22) Gold Seal (1921), 62 S.C.R. 424, at p. 470.

of liquor. Though the defendants argued that the Act violated section 121, the Privy Council drew a distinction between "free" admission and "free" use after admission:

> It is not an interference with sec. 121 of The B.N.A. Act, for the word "free," applied to admission into a province, does not further mean that when admitted the article in question can be used in any way its owner chooses, and although this Act, like many other Liquor Acts, has been made increasingly restrictive of individual freedom and enforced by legal measures of progressive severity, its competence depends on its general character and objects and not on the weight with which the Legislature lays its hand on those who violate its statutes. (137-8)

In Little, the British Columbia Court of Appeal upheld a requirement that imported liquor be reported so that the Liquor Control Board could impose a tax equal to what the province would have received had the liquor been purchased from a government store. The tax, it said, "was not a customs or similar charge imposed on goods as a condition of entry, but a direct tax following their importation."(23) The issue here, however, had as much to do with the meaning of "direct taxation" within a province as with section 121.

Similarly, in Atlantic Smoke Shops Ltd. v. Conlon, [1943] A.C. 550, a major case in the evolution of provincial powers with respect to sales tax, New Brunswick had placed a tax on the purchase of tobacco for consumption. In addition, persons importing tobacco for consumption were liable to the tax. The Privy Council held that section 121 was directed at preventing customs duties, and that the New Brunswick statute was rather a direct tax on consumption. A person did not pay the tax as a condition of receiving a commodity, but only if he was a prospective smoker or consumer.

Thus, the early evolution of section 121 was influenced by two factors. First, the cases involved what are now called "sin taxes" or, at the least, issues that were moral as much as economic. Second, in describing why section 121 did not apply, the view of the courts tended to

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(23) La Forest (1981), p. 179.

reflect the simpler economic world of the first few decades of the century. In the 1920s, it was easy for the courts to assume that customs-like duties or taxes could be the only barrier to free interprovincial movement of goods. The complex regulatory web which had evolved by the 1980s would probably have been beyond their wildest conjectures.

It can be argued that the courts' interpretation of "admitted free" could as easily be interpreted as "admitted free of any economic barrier that we can readily conceive." This point of view received considerable support in Murphy v. C.P.R., [1958] S.C.R. 626, wherein the Canadian Wheat Board Act was challenged. That Act was upheld as regulating the supply of wheat rather than its interprovincial movement. Locke J., for the majority, followed Gold Seal in deciding that the aim of section 121 was to prohibit customs duties on interprovincial trade. Rand J., in a concurring judgment, noted that previous cases had not really found it necessary to analyze section 121, and commented on it at considerable length:

> "Free", in s. 121, means without impediment related to the traversing of a provincial boundary. . . I take s.121, apart from Customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary [(1958) 15 D.L.R. (2d) 145, pp. 150, 153].

This is the judgment cited by La Forest J. in Black, the 1989 Supreme Court of Canada case on section 6. Clearly it goes a great deal past a simple prohibition of customs duties:

> The decision of Rand J. in the Murphy case substituted the terms "fetters" and "impediments" for the older language of "taxes" and "customs duties" and referred

> to the free flow of "commerce" rather than "articles," "goods," or "products."(24)

Laskin C.J. approved the statement of Rand J. in Re Agricultural Marketing Products Act, [1978] 2 S.C.R. 1198. This action is consistent with his earlier comment on "one of the objects of Confederation, evidenced by the catalogue of federal powers and by section 121, namely, to form an economic unit of the whole of Canada."(25) He also suggested that section 121 might not apply equally to the federal and provincial governments.(26)

Rand J., it should be noted, did not suggest that s. 121 could be used to strike down all interprovincial trade regulation. He approved the scheme of the Canadian Wheat Board Act, notwithstanding its effect on an individual producer:

> The Act operates on the individual by keeping him in effect in a queue but the orderly flow of products proceeds unabated.
>
> Section 121 does not extend to each producer in a Province an individual right to ship freely regardless of his place in that order (Murphy, p. 153).

As for whether the application of section 121 differed between the federal and provincial governments, Rand J. was not as sweeping as Laskin C.J. Considering the scheme a "social and economic necessity" and beyond provincial competence, he concluded that the federal Act could

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(24) Michael Penny, Michael J. Trebilcock and John B. Laskin, "Existing and Proposed Constitutional Restraints on Provincially Induced Barriers to Economic Mobility in Canada," Michael J. Trebilcock et al., eds., Federalism and the Canadian Economic Union, published for the Ontario Economic Council by University of Toronto Press, 1983, p. 505.

(25) A.G. Manitoba v. Manitoba Egg and Poultry Association, [1971] S.C.R. 689, at p. 727.

(26) "What may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute." Re Agricultural Marketing Products Act, p. 1267.

not be considered as conflicting with section 121; otherwise, a "constitutional hiatus" would be created (Murphy, p. 153).

Thus, section 121 has life in it yet. As recently as 1982, the Nova Scotia Supreme Court, Appeal Division, referred to it in a case involving section 8(2) of the provincial sales tax Act (Health Services Tax Act) which limited the tax credit given on trade-ins to purchasers of property within the province. For example, if a resident of Amherst, Nova Scotia, purchased a new car in Amherst for $5,000 and received a $2,000 credit for his trade-in, he paid tax on only $3,000. If he purchased the same car, under the same conditions, from a dealer in Sackville, New Brunswick, approximately ten miles away, he paid tax on the entire $5,000. Although the court found the section ineffective on purely interpretive grounds, Jones J.A. also referred to section 121:

> It is evident that the amendment was intended to discriminate between sales within the province and those taking place outside, and to favour purchases in the province. No legitimate reason was put forth to substantiate the need for such a practice as part of the overall scheme of legitimately raising revenue by direct taxation within the province. I cannot conceive of any other object of s. 8(2) than to discourage residents of the province from purchasing property outside the province. ... In doing so s. 8(2) violates the provisions of ss. 121 and 122 of the B.N.A. Act and, accordingly, is ultra vires.(27)

In short, section 121 has already gone through three phases of interpretive history. For the first 50 years of Confederation, it was not referred to at all. For the next 40 it was considered, in the very few cases involved, to prohibit only the traditional customs duties with which the courts of the late nineteenth and early twentieth century would be familiar. Since then it has been referred to infrequently and indirectly, but it can be argued that the Supreme Court of Canada has now approved a far more sweeping interpretation than was formerly the case.

Thus section 121 was seeing a modest revival of influence even before the constitutional negotiations of 1980-81, and before the

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(27) Clearwater v. Minister of Finance (1982), 52 N.S.R. (2d), p. 430.

Charter came into existence. It seemed unlikely, however, that the revival would have a significant impact on interprovincial barriers. For one thing, the federal government seems to have been reluctant to push for an expansive interpretation of section 121, presumably because it might have found its own economic policies limited, particularly those with respect to regional development. For another, Canadian lawyers, at least prior to the Charter, were used to arguing in terms of the division of powers, rather than the prohibition of government conduct.

> First, until recently, Canadian lawyers, little aware of economic integration theory, were not inclined to use section 121 to promote the interests of their clients, preferring to rely upon section 91(2), which was much more familiar in constitutional terms. Contrary to what occurred in Australia, it is through a provision attributing competence, rather than the more direct prohibitive one, that problems of free movement have been broached. Second, when federal authorities have intervened in questions of this nature, they have constantly emphasized recourse to section 91(2), which favors an extension of their power, rather than section 121, likely to be interpreted as applying to both Parliament and the provincial legislatures.(28)

Overall, as the 1980s approached, it seemed that Creighton had correctly assessed the Constitution's weaknesses in maintaining the economic union:

> The Fathers of Confederation devised a federal scheme which sufficed for decades to meet the needs of a relatively simple economy; but its weaknesses have been exposed, as they never were before, by the pressure of

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(28) Ivan Bernier et al., "The Concept of Economic Union in International and Constitutional Law," Perspectives on the Canadian Economic Union, Volume 60 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (hereafter Macdonald Commission), Toronto, 1985, p. 62.

> those burdens which are the inevitable accompaniment of a complex and unstable modern world.(29)

## THE DEBATE ON ECONOMIC UNION PRIOR TO 1982

As the 1980s approached, concerns about the state of the Canadian economic union grew apace, along with proposals for constitutional reform. Among the first major studies were A.E. Safarian's now classic Canadian Federalism and Economic Integration (1974) and reports from the Task force on Canadian Unity, the Canadian Bar Association, and the federal government.(30) All suggested strengthening section 121 to guarantee the free movement of goods, capital, people and services in Canada, and all were cited in the 1989 Black decision as part of the "wave of political and academic concern regarding the construction of numerous barriers to interprovincial economic activity" (p. 611).

Safarian's study presented a scheme for classifying the degree of economic integration that was cited by subsequent works:

(a) Free trade area, which involves the removal of customs tariffs and quantitative restrictions, such as quotas, on trade between the member countries, but with each of them retaining its own distinct barriers against non-members.

(b) Customs union, which in addition to (a) standardizes such barriers by member countries against non-members [i.e., adopts a common external tariff].

(c) Common market, which in addition to (b) removes restrictions on the movement of labour and capital between member countries.

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(29) Creighton (1939), p. 8.

(30) A.E. Safarian, Canadian Federalism and Economic Integration, Privy Council Office, Ottawa, 1974; Canada, The Task Force on Canadian Unity, A Future Together: Observations and Recommendations, Ottawa, 1979; Canadian Bar Association, Committee on the Constitution, Towards a New Canada, Montreal, 1978; and Jean Chrétien, Securing the Economic Union in the Constitution, Government of Canada, Ottawa, 1980.

(d) Economic union, which in addition to (c) involves varying degrees of harmonization of national economic policies in order to remove discrimination due to disparities in these policies.

(e) A federal state, which is a form of union in which the general government and the provinces or states each exercise exclusive jurisdiction in some major areas of policy and shared jurisdiction in others.

(f) A unitary state, wherein the general government has jurisdiction over economic and other major policies.(31)

What dismayed many commentators was how far Canada was from the definition of a federal state, or even a common market. Safarian himself wrote that "in summary, section 121 of the B.N.A. Act constitutionally establishes a customs union rather than the more integrated, and largely de facto, common market for Canada."(32) The Quebec Liberal Party's 1980 beige paper on Confederation (A New Canadian Federation) pointed out that more barriers to economic mobility were prohibited in the European Economic Community than are currently prohibited in Canada.(33)

A 1983 publication briefly surveyed the constitutions of selected other federations and international organizations, and then considered Canada:

> With this background to provide some perspective, we can turn to an examination of institutional arrangements concerning the Canadian common market. By contrast with the cases mentioned above, the Canadian Constitution as embodied in the Constitution Act, 1867 provides very little insight into the nature of the Canadian common market. There exists no statement of the principles guiding its goals, structure or

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(31) Cited by T.J. Courchene, "Analytical Perspectives on the Canadian Economic Union," in Trebilcock et al., Federalism and the Canadian Economic Union (1983), p. 59-60.

(32) Safarian (1974), p. 20.

(33) Cited in Penny, Trebilcock and Laskin (1983), p. 525.

> evolution. Furthermore, there are few specific rules to protect the common market. Of the more than 140 sections of the Act, only one, section 121, pertains to the nature of the Canadian common market.(34)

There are numerous ways in which either level of government can interfere with the free flow of goods, people, services and capital. Provincial non-tariff barriers have included procurement policies, subsidies, regulatory standards, natural resource policies, and liquor policies. As for the federal government, "energy policies, the tariff and other trade restrictions, the tax system and freight rates can all be seen as efforts of the federal Parliament to redistribute national wealth"(35) and affect economic mobility. This is, of course, before we even start to consider such deliberate and accepted policies as equalization payments and regional redistribution.

Although it has been argued that the federal programs have more overall effect, the provincial policies are generally seen as more destructive and less defensible. Among the specific provincial actions that caused concern in the years immediately preceding the constitutional negotiations were: a Prince Edward Island law restricting the right of Canadian individuals and companies resident outside the province to own land in the province; a Quebec law imposing restrictions on the mobility of construction workers within the province and on workers coming into the province from outside; a Newfoundland law requiring offshore petroleum companies to give Newfoundland residents preference in hiring and to purchase local goods and services; a Nova Scotia law enabling the government to require petroleum companies to give employment preference to Nova Scotians; British Columbia's intervention in the takeover of a local forest products company by an out-of-province company and Quebec's similar

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(34) F.R. Flatters and R.G. Lipsey, Common Ground for the Canadian Common Market, Institute for Research on Public Policy, Montreal, 1983, p. 9.

(35) Nola Silzer and Mark Krasnick, "The Free Flow of Goods in the Canadian Economic Union, Constitutional Law," Perspectives on the Canadian Economic Union, Volume 60 of the Macdonald Commission Report, Toronto, 1985, p. 182.

action regarding a local financial company; and Alberta's cutback in oil production to influence energy policy and price negotiations.(36)

As part of the constitutional negotiations leading to the Constitution Act, 1982, the federal government suggested three possible means to enhance the Canadian Economic Union (CEU):

> (i) entrenching in the Constitution the mobility rights of citizens, as well as their right to gain a livelihood and acquire property in any province, regardless of their provinces of residences or previous residence and subject to laws of general application;
>
> (ii) placing limitations upon the ability of governments to use their legislative and executive powers to impede economic mobility by way of general provisions, through the revision and expansion of section 121 of the BNA Act;
>
> (iii) broadening federal powers so that they may encompass all matters that are necessary for economic integration, thus ensuring that the relevant laws and regulations will apply uniformly throughout Canada, or that the "test" of the public interest will be brought to bear upon derogation from uniformity.(37)

The first approach, somewhat weakened, became section 6 of the Charter; the second would have resulted in a strengthened 121 covering services and capital as well as goods; and the third approach would have seen an expanded section 91(2).

The proposed revision to section 121 was rejected by nine of the ten provinces at the 1980 Constitutional Conference. A major reason was that section 121(3) would have exempted laws passed by Parliament

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(36) John A. Hayes, Economic Mobility in Canada, Government of Canada, Ottawa, 1982, p. 10-11.

(37) Chrétien (1980), p. 29-30 (as cited in Thomas J. Courchene, Economic Management and the Division of Powers, Vol. 67 of the Macdonald Commission Report, Toronto, 1985, p. 215).

pursuant to the principles of equalization and regional development. Not unexpectedly, the provinces saw this as allowing the federal government to do exactly what would be forbidden to the provinces and, what was even more galling, to take credit for it.(38)

Nonetheless, as Courchene points out, the very existence of the federal proposals may have affected the overall negotiations:

> Rather than jockeying for more powers, the provinces suddenly realized that the impact of the CEU might well be to undermine substantially their existing powers. In this way the CEU, and particularly the manner in which Ottawa backed off from its original proposals, may have played a role in securing the constitutional accord. The basic point in all this that a large part of the reason why the CEU is such a contentious issue relates to the dramatic impact it might have on the division of powers.(39)

Ultimately, it appears that neither level of government wanted to insist on a broadly defined right of economic mobility because it was unclear how far it would limit the powers of either or both. Both levels of government appeared to be more comfortable with the known rules of allocation of power rather than the relatively unknown rules of limitation on power. What remains to be seen is how much the Charter, and the legal atmosphere surrounding the Charter, will force a change of the rules regardless of governmental intent. As individual claimants and their lawyers become increasingly used to basing their arguments on personal mobility rights, they may become more willing to use section 121 to test the limits of individual rights with respect to other interprovincial barriers.

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(38) Tanya Lee and Michael J. Trebilcock, "Economic Mobility and Constitutional Reform," 37 University of Toronto Law Journal (1987) 268, p. 274.

(39) Courchene (1985), p. 226.

## SECTION 6

Section 6, in its entirety, reads as follows:

> (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
> (a) to move to and take up residence in any province;
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

As originally proposed by the federal government, section 6 would have guaranteed a right to hold property in any province as well as a right to pursue the gaining of a livelihood in any province. This was not acceptable to the provinces, although the majority opinion seems to be that section 6 would still guarantee a right to own property where this was necessary to pursue a livelihood.(40)

The section 6 originally proposed did not have subsection 6(3)(b) or the affirmative action subsection 6(4), which was apparently added at the insistence of Newfoundland to protect preferential hiring in

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(40) See Peter Bernhardt, "Mobility Rights: Section 6 of the Charter: The Canadian Economic Union," Queen's Law Journal, Vol. 12, 1987.

the offshore oil industry.(41) The scope of 6(4) is not yet clear, but it drew considerable fire at the time it was presented:

> The mobility rights escape clause agreed on in November, 1981, for use by provinces with above-average unemployment, is unknown in other federations and in the EEC. It will confer respectability on measures that are generally regarded as incompatible with the notion of common citizenship.(42)

Overall, however, it is somewhat surprising that the provinces ultimately accepted section 6 to the degree they did. When asked to define, in January 1981, what he meant by "general opposition" from the provinces, Jean Chrétien had responded: "Ontario supported it and there might be another province..."(43)

Provincial acquiescence in section 6 is particularly surprising in light of the fact that it is one of the few Charter rights not subject to provincial or federal override by section 33. Section 6 and section 121 are therefore parallel rights: enforceable against either level of government and not subject to legislative countermand.

There are three possible rationales for a right of personal and economic mobility. The first is that mobility is a purely individual right; the second, that it is a necessary characteristic of citizenship; and the third, that it will enhance the economic efficiency of the country. Commentators have suggested that section 6(2) primarily protects a personal mobility right, rather than a citizenship right or an economic infrastructure:

> If the participants [to the constitutional negotiations] had agreed to either the economic efficiency

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(41) See Douglas A. Schmeiser and Katherine J. Young, "Mobility Rights in Canada," 13 Manitoba Law Journal 615, at 626; Bernhardt (1987), note 23, p. 205.

(42) Hayes (1982), p. 7-8.

(43) Sanda Rodgers-Magnet and Joseph Eliot Magnet, "Mobility Rights: Personal Mobility and the Canadian Economic Union," in Vol. 60 of the Macdonald Commission Report, p. 249.

> rationale or a generous interpretation of the rights accruing to citizenship, the proposed new section 121 would probably have been adopted.(44)

In Black, however, the Supreme Court adopted the viewpoint that section 6 mobility rights are essentially rights related to citizenship.(45) This case originated in 1981, when, as part of a broader objective of becoming a national law firm, a Toronto-based law firm, McCarthy & McCarthy, proposed to open a office in Calgary, staffed entirely by partners and associates qualified to practise law in Alberta. On 1 September 1981, Mr. Black formed a law partnership called Black & Co., and commenced operations in Calgary. All of the partners of the firm were members of the Law Society of Alberta but were also partners of McCarthy & McCarthy. Some of the partners resided in Calgary and some in Toronto.

In early 1983 two new rules of the Law Society of Alberta came into effect. Rule 75B stated that no member of the Law Society could be a partner in, or associated with, more than one law firm. Rule 154 stated that an active member of the Society residing and practising law within Alberta could not enter into, or continue, a partnership or association with anyone who was not also an active member ordinarily residing in Alberta.

The Law Society of Alberta argued that section 6(2)(b) of the Charter protected only the right to move to another province for the purpose of gaining a livelihood, not the right to gain a livelihood: "Both [Rule 75B and Rule 154], it argued, affect the mobility of legal services, not the mobility of persons. Only the latter is protected by s. 6, it maintained."(46)

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(44) Lee and Trebilcock (1987), p. 283.

(45) Section 6 rights accrue also to permanent residents, but this paper refers only to "citizenship rights" and "citizens" for simplicity's sake.

(46) Black v. Law Society of B.C., p. 608.

The Law Society also argued that, even if the two rules were in violation of section 6, they were reasonable limitations under section 1 of the Charter, in order to regulate and control the legal profession. To ensure high standards of competence and ethics, the society argued that the rules were necessary to control possible practice by non-members, maintain local competence and expertise, preserve the assurance fund and liability insurance coverage, maintain effective discipline powers, make competence support programs effective, prevent fee-splitting, and control breaches of confidentiality and conflict of interest. For reasons that are not relevant to this paper, the Supreme Court rejected all of the section 1 arguments of the Law Society.

In the Supreme Court decision on Black, with respect to the mobility argument itself La Forest J. first referred to Union Colliery and Winner,(47) two much-cited cases on the right to live and work in a province. In Union Colliery, the Privy Council found ultra vires a provision in a British Columbia statute that prohibited employing people of Chinese origin or descent in the mines. Parliament's authority over "naturalization and aliens," the court found, gave the federal government the power to determine the rights and privileges of naturalized Canadian residents. In Winner, a case involving provincial limitations on interprovincial and international bus transport, Rand J. described interprovincial mobility as an inherent attribute of citizenship:

> What this implies is that a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action...
>
> It follows, a fortiori, that a province cannot prevent a Canadian from entering it except, conceivably, in

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(47) Union Colliery Company of British Columbia v. Bryden, [1899] A.C. 580; Winner v. S.M.T. (Eastern) Ltd., [1951] S.C.R. 887.

> temporary circumstances, for some local reason as, for example, health.(48)

La Forest J. then found that "inhering in citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries" (p. 612).

> The provinces may, of course, regulate these rights... But, subject to the exceptions in ss. 1 and 6 of the Charter, they cannot do so in terms of provincial boundaries. That would derogate from the inherent rights of the citizen to be treated equally in his capacity as a citizen throughout Canada. (p. 620-621)

Nor did the court find that the right to pursue a living was conditional upon being in the province in question. It held that a citizen or permanent resident has the right to pursue a living in one province while resident in another province or, presumably, out of the country entirely.

Although the decision in Black was founded on inherent citizenship rights, the Supreme Court did not ignore the economic implications of section 6. Noting that concerns "regarding the construction of numerous barriers to interprovincial economic activity" had undoubtedly played a part in the entrenchment of mobility rights (p. 611), the court also looked at the treatment of mobility rights under the American constitution. It decided that, there too, the governmental interest in mobility rights was to fuse a single, united nation, but the vehicle chosen was that of according rights to the citizen. "The same state economic concerns and the right of the citizen are intertwined" (p. 614).

The question has yet to be decided as to how far the right to pursue a livelihood might go. Emilio Binavince, in an early article on mobility rights before any judicial trends were clear, argued that the rights guaranteed by section 6(2)(b) necessarily involve the "acquisition and use of goods, services and capital."(49)

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(48) Winner, p. 919-920.

(49) Emilio Binavince, "The Impact of the Mobility Rights: The Canadian Economic Union -- A Boom or a Bust?" 14 Ottawa Law Review, 1982, p. 341.

While this might be a little broad, it does seem that section 6 might apply at least to the provision of services, which tend to involve the movement of people more than goods.(50)

## CONCLUSION

The Supreme Court of Canada decision in Black v. Law Society of Alberta gives the most generous interpretation to date of the mobility rights contained in section 6 of the Charter. Although the court treated mobility rights as primarily adhering to citizenship rights, it noted at some length the interrelationship between personal mobility rights and the national economic union.

The court also appeared to endorse the broad interpretation of section 121 of the Constitution Act, 1982 suggested in earlier dicta. Specifically, it referred to comments by Rand J. in Murphy v. C.P.R, the same judgment referred to in Final Report of the Macdonald Commission as possibly applying section 121 to services and to non-tariff barriers.(51)

In Black, the interpretation of both section 6 and section 121 was placed in the context of creating and maintaining the national economic union through unimpeded interprovincial trade and commerce. Section 121, standing alone, prohibits barriers to interprovincial trade in goods. Section 6, standing alone, prohibits barriers to interprovincial labour mobility. When section 6 and section 121 are placed together, it is hard to see how interprovincial barriers to services can be immune.

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(50) "Binavince argues that this section includes protection of the free movement of goods because they are utilized by a person 'to pursue the gaining of a livelihood in any province.' In our view, this argument is tenuous given the nature and outcome of constitutional discussions... This provision is more likely a legal challenge to procurement of services rather than goods" (Silzer and Krasnick, in Vol. 60, Macdonald Commission Report, p. 173).

(51) Final Report of Macdonald Commission, Ottawa, 1985, p. 115.

Through the generous interpretation of section 6, the apparent approval of an expanded interpretation of section 121, and the liberal references to the importance of the economic union in the framing of the Constitution, the Supreme Court of Canada, in its decision in Black, has opened the door to challenges of many of the barriers now in place to interprovincial trade in goods, services and labour.

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